

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
CITY OF DAVENPORT,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 79-208

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

THIS MATTER, the appeal of a \$250 civil penalty for outdoor burning allegedly in violation of WAC 173-425-045 and RCW 79.94, having come on regularly for formal hearing on the 9th day of March, 1980 in Spokane, Washington, and appellant City of Davenport, appearing through its attorney Kenneth D. Carpenter, and respondent Department of Ecology, appearing through its attorney Wick Dufford, with Nat W. Washington presiding, and the Board having considered the testimony, records and files herein, and having reviewed the Proposed Order of the presiding officer mailed to the parties on the 24th day

1 of April, 1980, and more than twenty days having elapsed from said
2 service; and

3 The Board having received no exceptions to said Proposed Order and
4 the Board being fully advised in the premises; NOW THEREFORE,

5 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said Proposed
6 Order containing Findings of Fact, Conclusions of Law and Order dated
7 the 24th day of April, 1980, and incorporated by reference herein and
8 attached hereto as Exhibit A, are adopted and hereby entered as the
9 Board's Final Findings of Fact, Conclusions of Law and Order herein.

10 DATED this 30th day of June, 1980.

11 POLLUTION CONTROL HEARINGS BOARD

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14 NAT W. WASHINGTON, Chairman

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16 DAVID AKANA, Member

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IN THE MATTER OF
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PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal of a \$250 civil penalty for outdoor burning allegedly in violation of WAC 173-425-045 and RCW 79.94 came before the Pollution Control Hearings Board on March 9, 1980, in Spokane, Washington. Board member Nat W. Washington presided alone. Appellant was represented by its attorney Kenneth D. Carpenter. Respondent was represented by its attorney Wick Dufford. Respondent elected a formal hearing pursuant to RCW 43.21B.230.

Having heard the testimony, there being no exhibits, having considered the briefs, contentions and arguments of the parties, and

EXHIBIT A

1 being fully advised, the Pollution Control Hearings Board makes these

2 FINDINGS OF FACT

3 I

4 The appellant City of Davenport is the operator of a solid waste
5 disposal site which has a history of being susceptible to fires caused
6 by spontaneous combustion. Poor drainage which tends to build up the
7 moisture content of the waste is believed by appellant to be a major
8 cause of the spontaneous combustion problem. In order to alleviate
9 the danger of fire, garbage is dumped behind the face of the fill
10 where it is left for 48 hours to dry out. It is then pushed over the
11 face of the fill and covered with dirt.

12 II

13 On Wednesday, November 7, 1979, at between 10:30 a.m. and 11:00
14 a.m., the solid waste collector of the City, who also acts as the
15 on-site operator of the disposal site, arrived at the site with a load
16 of garbage. At the time of his arrival a fire was burning in the
17 garbage which had been left to dry the day before.

18 III

19 Sometime between about 12:30 p.m. and 1:00 p.m. the solid waste
20 coordinator for the regional office of the Department of Ecology in
21 Spokane was in the general area of Davenport. He observed a plume of
22 smoke arising in the distance from the area of the Davenport solid
23 waste disposal site. He drove to the site, a trip which took about
24 ten minutes driving time. On arriving he saw that a fire in a pile of
25 garbage, which appeared to be about the size of one load of a
26 compactor garbage truck, was the source of the smoke plume that had

1 attracted his attention. In addition to other material, the fire
2 contained garbage and plastic material, both of which are prohibited
3 material under WAC 173-425-045.

4 He noted that nothing was being done to extinguish or control the
5 fire. He talked to the appellant's on-site operator and found that he
6 had made no attempt to put it out, although a bulldozer was available
7 to be used for this purpose. Respondent's coordinator told the
8 operator that an effort should be made to put the fire out. The
9 operator then utilized the bulldozer and commenced bringing the fire
10 under control. The fire was completely extinguished later that
11 afternoon.

12 IV

13 There is no evidence that appellant was in any way responsible for
14 starting the fire, but was responsible for allowing the fire to
15 continue burning unchecked and to continue discharging pollutants into
16 the atmosphere long after its operator had discovered it.

17 V

18 The appellant presented no evidence that it had developed any
19 specific plan for combating fires at the disposal site in order to
20 reduce air pollution.

21 VI

22 The appellant presented no evidence which would indicate that the
23 on-site operator had ever been given instruction as to the procedure
24 to be followed by him in the event of fire; and no evidence was
25 presented that he had been instructed that it was necessary to put
26 fires out as quickly as reasonably possible in order to reduce air
27

pollution.

VII

Appellant contends that when its operator first discovered the fire the flames were too high and the fire was too hot to allow him to attempt to put the fire out by utilizing the bulldozer to break it up and cover it with dirt. In support of this position appellant presented testimony that it would have been dangerous for the operator to approach the fire with the bulldozer because much flammable oil and grease had accumulated on surface parts of the machine.

The appellant knew it had allowed oil and grease to accumulate on the bulldozer, making it hazardous to use it for fire control purposes until after subsidence of the flames. Had the bulldozer been kept reasonably free of oil and grease it could have been utilized in putting out the fire much sooner than it was.

VIII

The appellant has no prior record of any violation of respondent's clean air regulations.

IX

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings, the Board comes to these

CONCLUSIONS OF LAW

I

WAC 173-425-045 provides that garbage and plastics shall not be burned in any open fire.

II

The fire at appellant's solid waste disposal site which was allowed by the appellant to continue to burn after having been started by unknown causes was an open fire within the purview of WAC 173-425-045 and none of the exceptions set forth in WAC 173-425-045 apply.

III

RCW 70.94.040 provides:

Except where specified in a variance permit, as provided in RCW 70.94.181, it shall be unlawful for any person knowingly to cause air pollution or knowingly permit it to be caused in violation of this chapter, or of any ordinance, resolution, rule or regulation validly promulgated hereunder. (emphasis supplied)

The pertinent portion of RCW 70.94.775 provides:

No person shall cause or allow any outdoor fire:
(1) Containing garbage, dead animals, asphalt, petroleum products, paints, rubber products, plastics, or any substance other than natural vegetation which normally emits dense smoke or obnoxious odors except as provided in RCW 70.94.650: Provided, That agricultural heating devices which otherwise meet the requirements of this chapter shall not be considered outdoor fires under this section; (emphasis supplied)

IV

The appellant, by allowing the fire containing material prohibited by WAC 173-425-045 to continue to burn for more than an hour after discovery, without taking reasonably prudent precautions to put it out, knowingly permitted prohibited material to be burned and pollution to be caused in violation of RCW 70.94.040 and WAC 173-425-045. The failure of the appellant to take reasonably prudent

precautions to put the fire out constitutes allowing an outdoor fire in violation of RCW 70.94.775.

This Conclusion of Law is well supported by our decision in Town of Cathlamet v. SWAPCA, PCHB No. 78-249 at page 8. The Board stated:

"While the appellant did not deliberately set the fires in question, we have long held that one may "cause or allow" a fire by failing to take reasonably prudent precautions to put the fire out. Burlington Northern RR v. PSAPCA, PCHB No. 100 (1972), A-1 Auto Wrecking v. PSAPCA, PCHB No. 337 (1973) and Northwest Pipe and Steel v. PSAPCA, PCHB No. 468 (1974)."

V

By failing to make any effort to extinguish the fire until after it had burned and polluted for over one hour, and by failing to develop and put into action a specific plan to combat chronic reoccurring fires, the appellant failed to take reasonably prudent precautions to put out the fire which occurred at its waste disposal site on November 7, 1979. Town of Cathlamet v. SWAPCA, supra at page 8.

VI

The fact that flammable oil and grease had accumulated on parts of the bulldozer does not excuse appellant's failure to promptly take steps to put out the fire. On the contrary, this fact is convincing evidence that the appellant did not make adequate preparation to combat fires at the disposal site. Knowing that the bulldozer was its major piece of fire fighting equipment, appellant was at fault in not keeping its surface reasonably free of flammable material.

VII

The appellant contends that since it did not start the fire it did not knowingly permit or cause air pollution and therefore did have the

1 requisite "scienter" to be found in violation of WAC 173-425-045 and
2 RCW 70.94.040. In support of its position appellant relies on the
3 opinion of Division II of the Court of Appeals in the case of Puget
4 Sound Air Pollution Control Agency v. Kaiser Aluminum and Chemical
5 Corporation, No. 3396-II, filed January 29, 1980.

6 In view of our finding that the appellant did act knowingly in
7 permitting the fire to continue to burn the question of "scienter" is
8 no longer an issue to addressed by us.

9 VIII

10 Even though the fire was not of long duration the failure of the
11 appellant to take reasonably prudent precautions to put it out did
12 constitute a violation of WAC 173-425-045 and RCW 70.94.040.

13 Nevertheless, the civil penalty, while reasonable, should be suspended
14 so that appellant will be in a better financial position to expend the
15 funds necessary to establish a workable plan to promptly combat future
16 fires at the disposal site.

17 IX

18 Any Finding of Fact which should be deemed a Conclusion of Law is
19 hereby adopted as such.

20 From these Conclusions the Board enters the following

21 ORDER

22 The \$250 civil penalty is affirmed, provided, however, the civil
23 penalty is suspended on condition that appellant not violate
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1 respondent's clean air regulation for a period of one year from date
2 of appellant's receipt of this order.

3 DATED this 24th day of April, 1980.

4 POLLUTION CONTROL HEARINGS BOARD

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7 NAT W. WASHINGTON, Chairman

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10 DAVID AKANA, Member

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27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER